IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,
Petitioners,

v.

LEROY FOUST,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. PUNITIVE DAMAGES ARE NOT A PROPER REMEDY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION UNDER THE RAILWAY LABOR ACT.

A. It is common ground that the Railway Labor Act ("RLA") and the National Labor Relations Act ("NLRA") are "similar" in defining the duty of fair representation which they impose on the collective bar-

gaining agent,[1] and respondent also appears to acknowledge that precedents and policies under the NLRA and the Labor-Management Relations Act of 1947 ("LMRA") provide a sound basis for deciding the remedial issue in this case. But we differ in our understanding of the NLRA law. Specifically, respondent would set aside the NLRA precedents in this Court—insofar as he mentions them at all—by resorting to distinctions which are patently untenable, see pp. 2-3, *infra*, and he places his reliance on a line of cases involving state law remedies for violation of state tort laws, which are plainly inapposite, see p. 4, *infra*.

1. Respondent begins with the assertion that the "differences" between the union's duty to bargain with the employer and its duty of fair representation "are as significant as the differences between day and night". (Resp. Br. 5).[2] Although the point of the ensuing discussion is not entirely clear, respondent appears to contend that the remedies available against the union to "an individual member of the collective bargaining unit" differ from those available to an employer (*id.*). But § 10 (c) of the NLRA disallows punitive remedies without regard to the identity of the party that committed the unfair labor practice or the victim. Thus, for example, *Carpenters Local* v. *Labor Board*, 365 U.S. 651, cited at Pet. Br. 14, n. 9, rejected as punitive a dues reimbursement remedy which the NLRB had awarded against a

[1] See Brief for Respondent (hereafter, "Resp. Br.") 3; Brief for Petitioners (hereafter "Pet. Br.") 11-12.

[2] Resp. Br. pp. 5-6 addresses the standard of union behavior established by the duty of fair representation. The standard declared in the Sixth Circuit case which respondent quotes at length is far more onerous than that declared by several other Courts of Appeals, see p. 9, n. 12 of the Petition for Certiorari. But the "denial of certiorari on that issue concludes any debate as to the definition of the duty and its breach in the instant case." (Resp. Br. 6) By nevertheless dwelling on this point respondent merely beclouds analysis of the issues which are presented.

union in favor of the individual members of the bargaining unit.[3]

Nor is the NLRA's anti-punitive remedial policy based on any "government-private" distinction as argued at Resp. Br. 12-13. While § 10(c) deals with the authority of the National Labor Relations Board, its language was "construed in harmony with the spirit and remedial purposes of the Act" (*Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 11), and not out of fear of the abuse of governmental power as such. Moreover, when the LMRA established private causes of action, it carried forward the remedial purposes of the NLRA, as this Court held with respect to suits under § 303 in *Teamsters Union* v. *Morton*, 377 U.S. 252, quoted at Pet. Br. 16-17. *Morton*, of course, involved a "statutory tort" predicated on § 8(b)(4) of the National Labor Relations Act. Any reliance on "traditional tort remedies" (Resp. Br. p. 9) is therefore bootless.

[3] Moreover, *Williams* v. *Pacific Maritime Association*, 421 F.2d 1287 (CA 9), cited at Resp. Br. 13, was not simply a "Member v. Member" suit. Rather, that case, in which the court held that punitive damages would not be available in a duty of fair representation case (*id.* at 1289 and n. 1, citing *Vaca* v. *Sipes*, 386 U.S. 171; *Republic Steel*, *supra* and *Local 127, etc.* v. *Brooks Shoe*, 298 F.2d 277 (CA 3)), was one against unions as well as union officers. (See our discussion of *Williams* at Pet. Br. 18-19.) Almost at the very outset, the court expressly refers to "defendant unions". (421 F.2d at 1288.) The Ninth Circuit also noted that, in the District Court, "Defendants moved to strike these claims on the ground that, under federal labor law, no monetary damages may be recovered from individuals based upon their conduct as members or officials of a labor union, *and no punitive damages may be recovered from a union or its members and officials based upon union activity.*" (*Id.*, emphasis added.) See also the more extensive description of the complaint in the court's prior opinion in that litigation, 384 F.2d 935 (CA 9).

The other cases cited at Resp. Br. 13 are also incorrectly described. *Local 57, ILGWU* v. *NLRB* involved the remedies available to the Board against an employer in favor of the union and employees. *Brooks Shoe* was a breach of contract suit by a union against an employer under § 301 of the LMRA.

2. Respondent invokes the line of authority from *United Automobile Workers* v. *Russell*, 356 U.S. 644, through *Farmer* v. *Carpenters*, 430 U.S. 290. As we pointed out at Pet. Br. 23-24, however, those decisions permit the award of punitive damages where the claim grows out of a labor dispute but is based on the *state* law of torts; *Laburnum* and *Russell* rejected, over strong dissent, an argument for uniformity indistinguishable from that advanced at Resp. Br. 11-12. These decisions provide no support for the award of punitive damages as a matter of *federal* labor law for violation of duties created by the NLRA or the RLA. They show instead that, if a uniform remedial scheme had been imposed on the states, punitive damages would have been barred, rather than embraced as respondent urges. For it was understood on both sides of the controversy that the national labor policy disfavors punitive remedies;[4] the sole controversy concerned the permissible reach of that policy. Indeed, notwithstanding the anti-preemption rulings of *Laburnum* and *Russell*, this Court has repeatedly admonished the states against awarding excessive punitive damages in labor cases, see Pet. Br. 23-24.

3. Respondent draws upon, but misconceives, the holding of *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 "that the substantive law to apply in suits under § 301(a) [of the LMRA] is a federal law which the courts must fashion from the policy of our national labor law," and seizes upon the phrase "judicial inventiveness" in this Court's opinion, *id.* at 457 (see Resp. Br. 6-7, 8).[5] But "*Lincoln Mills* did not envision any free-

[4] See especially *Russell*, 356 U.S. at 646, quoted at Pet. Br. 23, and 356 U.S. at 650-659 (dissenting opinion).

[5] Three of the cases which are cited as examples of "judicial inventiveness" at Resp. Br. 8-9 rejected punitive damages for breach of the duty of fair representation; those decisions were not the products of the courts' imagination, but of their analysis of the statutory policy and of precedent. See the quotations from those decisions at Pet. Br. 18-19 (*Williams*), Pet. Br. 29, n. 15 (*Brady*) and Pet. Br. 29-30, n. 16 (*Crawford*). The Eighth Circuit's decisions cited at Resp. Br. 8 merely assumed "arguendo" that punitive damages might be available in a duty of fair representation suit, see Pet. Br. 30. The other district court cases cited at Resp. Br. 9 did not award punitive damages; they denied motions to strike prayers for such damages, ruling that they might be available. Only the *Sidney Wanzer* case, a breach of contract action, contains any considering analysis of the subject, and the court qualified its conclusion as follows:

> Remedies under § 301 must be tailored to the problems which they are invoked to resolve. Thus, even though an award of exemplary damages is an available remedy under § 301, it is not appropriate in most cases. Such an award is extraordinary and should be reserved for those labor-management situations which cannot be pacified by other remedies. (249 F.Supp. 664, 671.)

wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements." *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 255. As the Court observed in *Howard Johnson*, the *Lincoln Mills* opinion "described the process of analysis to be employed" (*id.*) in fashioning the federal common law from the policy of our national labor laws:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. (353 U.S. at 457, quoted at 417 U.S. 255-256).

The *Howard Johnson* Court added:

> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301. * * *

The Court thereupon held that the standards which it had developed (primarily on the basis of § 8(d) of the NLRA)

for determining the rights and duties of successor employers in NLRB proceedings must also be followed by the courts in suits under § 301. Likewise, the federal common law of remedies in suits under § 301 must follow the law declared in § 10(c) and § 303 of the LMRA.

Congress was not attracted by the prospects that the "influence [of punitive damages] can be startling" (Resp. Br. 9), or that a "good dose of punitive damages, not unlike a good dose of castor oil, will stand as a constant reminder for the petitioner and others so situated to take care of their own body." (Resp. Br. 20) On the contrary, Congress has excluded punitive damages despite their acknowledged utility for deterrence. See *Republic Steel*, *supra*, 311 U.S. at 11-12, and the other cases quoted at Pet. Br. 15-16.[6]

4. The heart of the matter is that even if "traditional tort remedies have stood the judicial system in good stead" (Resp. Br. 9)—a proposition which is questionable at best, see Pet. Br. 39-44—it is clear that Congress in the NLRA rejected "punitive damages [as] one method by which the policy of the law is carried out" (Resp. Br. 9). In enacting the NLRA and establishing an elaborate and expensive machinery to administer it, Congress unquestionably sought to eradicate the employer misconduct which it there outlawed, but nevertheless refused to authorize punitive sanctions. And when Congress enacted the LMRA in 1947, the legislature was equally concerned in eliminating union unfair labor practices. Yet, Congress did not amend § 10(c) to provide

[6] What Mr. Justice Harlan wrote for the Court in *Machinists* v. *Labor Board*, 362 U.S. 411, 428 is very much in point:

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it.

for punitive damages; nor did it allow them in the civil suits which it provided to remedy union practices thought to be particularly serious and for which a private cause of action was created (§ 303).

In *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 185, the Court declared in the most forceful terms that the Act's prohibition of anti-union discrimination in hiring—which is a willful violation of employee rights—is central to the entire scheme of the Act.[7] Yet, in discussing the remedial scheme of the Act, the Court made clear that the discriminatees are to be made whole, but not more than whole.[8] It would be wholly incongruous to impute to Congress an intent to provide a punitive sanction for breaches of the duty of fair representation which it rejected with regard to discrimination on the basis of union membership, secondary boycotts and jurisdictional strikes.

B. It is clear from the foregoing and pp. 11-24 of our opening brief that the National Labor Relations Act embodies a Congressional policy against punitive damages. If that policy is to be taken as a guide for determining whether punitive damages are available for remedying a breach of the duty of fair representation under the RLA, the punitive damage award in this case may not stand. Nor may it stand if one looks to the RLA alone.

[7] The Court said (313 U.S. at 185):

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

[8] The Court said (*id.* at 197-198):

> Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.

Respondent is unable to advance anything to controvert our showing (Pet. Br. 24-28) that such an award against a union for breach of the duty of fair representation would be inconsistent with the policy judgments Congress made in the remedial provision of the RLA, § 2 (Tenth).[9] The same result follows if the Court adopts the method of construction (developed at Pet. Br. 34-44) from Judge Parker's insight in *United Mine Workers* v. *Patton*, 211 F.2d 742, 749-750, quoted at Pet. Br. 33-34. Here again, respondent provides no reasoned answer to our contention.[10] And while adoption of that general approach is not necessary to a decision in our favor, that course would provide guidance for the lower courts, which are increasingly called upon to pass on punitive damage requests under a variety of federal statutes.[11]

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[9] Respondent says only that the discussion of this point in *Deboles* v. *Trans World Airlines, Inc.*, 552 F.2d 1005 (CA 3), *cert. denied*, 434 U.S. 837, was "*dicta*" (Resp Br. 12). In this Court, however, the worth of a lower court opinion depends not on its authority as precedent, but on the merit of its analysis. Thus, what matters most for present purposes is that the Third Circuit gave thoughtful attention to the problem and provided a reasoned answer, firmly grounded in the statute (see Pet. Br. 24).

[10] Consistent with our view that the answer to the question presented here turns on the particular statutes involved and their legislative history, we have not examined the conclusion that would be reached if the method of interpretation we suggest were applied to statutes not now before the Court. For that reason, we submit that the decisions which allow punitive damages under Title I of the Landrum-Griffin Act, 29 U.S.C. § 411, *et seq.*, cited at Resp. Br. 7, are not in point here and that this is not the occasion to determine whether they were rightly decided.

[11] The discussion of punitive damages at Pet. Br. 42-43 is buttressed by the analysis of the Draft Uniform Product Liability Act posed by the Interagency Task Force on Product Liability and Accident Compensation, 43 Fed. Reg. 2996 *et seq.* (Jan. 12, 1979), which was published after we filed our opening brief. The analysis of the section on punitive damages states "Transcending all concerns is the total lack of structure surrounding punitive damages." *Id.* at 3018.

In sum, therefore, it is respondent who "would have this Court undertake a massive rewriting of the statutory scheme of national labor policy as is set forth in the National Labor Relations Act and the Railway Labor Act in order to provide" him with a windfall recovery (*cf.* Resp. Br. 14).

II. PUNITIVE DAMAGES COULD NOT PROPERLY BE AWARDED ON THIS RECORD.

Respondent errs in attributing to us a concession that we did not properly preserve below our contention that punitive damages could not properly be awarded on this record, even if they are sometimes allowable in RLA fair representation cases (Resp. Br. 15). Our position, that the evidence is inadequate as a matter of law to support an award for punitive damages, was presented below when defendants excepted to the District Court's instruction on punitive damages (A. 68-69) and again on the motion for judgment notwithstanding the verdict (A. 92). The issue that we acknowledged at Pet. Br. 46, n. 35, had not been adequately preserved, and would therefore not be briefed, was that of the union's "responsibility", that is, whether high level officials of the union were sufficiently involved to subject the union to punitive damages on a *respondeat superior* basis.[12]

Respondent also incorrectly states that this Court is being asked to set aside a factual determination on

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[12] Our reference there was to the long-standing federal rule which does not allow punitive damages to be awarded against a corporation (or, by extension, against a labor union) on the basis of the misconduct of an ordinary agent. However, a superior officer

> actually wielding the whole executive power of the corporation may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself.

Lake Shore & Michigan Southern Railway Co. v. *Prentice*, 147 U.S. 101, 114. See also, *e.g.*, the early admiralty case, *The Amiable Nancy*, 3 Wheat. (16 U.S.) 546, 558-559.

which the jury and the lower courts are in agreement (Resp. Br. 15). Our position is that the District Court erred as a matter of law in sending the issue to the jury and in failing to set aside the punitive award, and that the Court of Appeals applied the wrong legal standard in affirming the judgment. Respondent's extensive quotation (Resp. Br. 15-18) of the instruction and the court's opinion adds nothing.

Far from adopting "essentially the same" standard as was utilized below for determining whether plaintiff has established a claim for punitive damages, the decisions cited at Resp. Br. 18 support the proposition, stated in one of them, that "[t]he tort must be 'aggravated by evil motive, actual malice, deliberate violence or oppression.'" *Nadar* v. *Allegheny Airlines, Inc.*, 512 F.2d 527, 539 (C.A. D.C.), quoted more fully at Pet. Br. 48.[13] While it would unnecessarily extend this reply brief to examine all the lower court decisions cited by respondent, we note that the standard used by the court below differed from that of the Fourth and Eighth Circuits, whose decisions it cited, and that the court below acknowledged its difference with the Eighth Circuit (Pet. 18a).

Thus, respondent's assertion that the Tenth Circuit's standard is within the mainstream of the law is insupportable. And, of course, respondent does not even attempt to show how, on the record of this case, the decision below can be reconciled with *Carey* v. *Piphus*, 435 U.S. 247, 257, n. 11 (see Pet. Br. 47).

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[13] In *Automobile Workers* v. *Russell*, the Court stated that Alabama law provides punitive damages "when there is a willful and malicious wrong", 356 U.S. 634; see also paragraph 6 of the jury instruction quoted *id.* at 638, n. 3. Since *Curtis Publishing* v. *Butts*, 388 U.S. 130, involved an instruction on punitive damages based on Georgia law, we do not see how this case supports respondents's position. The three earlier decisions of this Court cited at Resp. Br. 18 follow the standard of the *Quigley* and *Arms* cases quoted at Pet. Br. 46-47 and 47, n.37.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court with directions to reduce the judgment to $40,000 by eliminating the award of "$75,000 punitive or exemplary damages" (A. 90).

Respectfully submitted,

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